A

TAN YING HONG

v.

TAN SIAN SAN & ORS

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
C JAMES FOONG FCJ
[CIVIL APPEAL NO: 02(f)-19-2009(C)]
21 JANUARY 2010

D ***LAND LAW****: Indefeasibility of title and interests - Forged charge - Bank acquired charge under forged power of attorney - Whether bank's interest defeasible - Whether Adorna Properties Sdn Bhd v. Boonsom Boonyanit correctly decided - National Land Code, ss. 340(2)(b), 340(3) & proviso*

E ***LAND LAW:*** *Indefeasibility of title and interests - Deferred or immediate - Title or interest acquired under s. 340(2) National Land Code - Whether defeasible notwithstanding bona fides of acquirer - Subsequent acquirers under s. 340(3) - Whether title or interest also defeasible unless good faith and valuable consideration shown by virtue of proviso to s. 340(3) - Whether proviso to s. 340(3) did not apply to s. 340(2) -*
F *Whether Adorna Properties Sdn Bhd v. Boonsom Boonyanit correctly decided*

G ***LAND LAW:*** *Indefeasibility of title and interests - Deferred or immediate - Interpretation of ss. 340(1), (2), (3) National Land Code - Whether s. 340(1) confers immediate indefeasibility - Whether s. 340(2) confers deferred indefeasibility to immediate acquirers - Whether s. 340(3) confers deferred indefeasibility to subsequent acquirers unless good faith and valuable consideration shown*

H ***BANKING****: Securities for advances - Charge - Forged charge - Bank acquired charge under forged power of attorney - Whether bank's interest defeasible - Whether Adorna Properties Sdn Bhd v. Boonsom Boonyanit correctly decided - National Land Code, ss. 340(2)(b), 340(3) & proviso*

I ***WORDS & PHRASES****: "in this subsection" - National Land Code, proviso to s. 340(3) - Meaning and interpretation of - Adorna Properties Sdn Bhd v. Boonsom Boonyanit*

This was an appeal against the decision of the Court of Appeal ruling, essentially: (i) that, upon the words of s. 340(2) and (3) of the National Land Code ('NLC'), and the authority of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 *('Adorna Properties')*, the third respondent bank/chargee herein had obtained good title to the appellant's property, notwithstanding that the charge instrument thereof had been found to be forged; and (ii) that, since the appellant, while being the registered owner, did not even apply for the land and was not aware that he was the registered owner until after the third respondent had issued the notice of demand, his application for declaratory relief was unsustainable and must necessarily fail.

The appellant was the registered proprietor of a certain property in Kuantan, Pahang. Unbeknown to the appellant, the first respondent, acting under a forged power of attorney ('PA'), executed two charges in favour of the bank to secure a loan for the second respondent. The second respondent reneged on the repayment and the bank hence demanded payment from the appellant. The appellant sought to declare the charges null and void on the ground that the PA was forged, but the application was dismissed by the High Court on grounds that the appellant was not "the actual owner of the land" and that s. 340(3) of the NLC (read with its proviso) had protected the third respondent. The appellant's appeal, as it were, was dismissed by the Court of Appeal.

It was not in dispute that by sub-s. (2) of s. 340 NLC, the title or interest of any acquirer of property would not be indefeasible *inter alia* in a case of fraud or misrepresentation or where registration was obtained by forgery. Subsection (3) in turn provided that in such instances of defeasibility as spelt out in sub-s. (2), such title or interest would also be liable to be set aside as against "… whom it may subsequently be transferred". Subsection (3), however, had a proviso in that "… nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration …" The Federal Court in *Adorna Properties* in effect ruled that by virtue of the proviso to sub-s. 3 aforesaid, the appellant therein, being a purchaser in good faith and for valuable consideration, was excluded from the application of the substantive provision of sub-s. (3), thereby giving it an indefeasible title to the land, notwithstanding that the instrument of transfer thereof was forged. This aside, it was the

A view of the said court that the proviso to sub-s. 3 applied equally to the provision of sub-s. (2). In the present appeal, arguments had apparently been advanced on behalf of the appellant that the proviso to sub-s. (3) applied only and exclusively to the situations covered by that sub-section – and not otherwise – and that the B Federal Court in *Adorna Properties* had therefore misconstrued the intent and purport of sub-ss. (2) and (3) and was wrong in ruling the way it did.

In any case, upon the single question of law posed to the Federal C Court in the instant appeal, it fell upon their Lordships to determine the following, namely: (i) whether the concept of indefeasibility as adverted to in s. 340 NLC referred to immediate or deferred indefeasibility; (ii) whether the proviso to sub-s. (3) of s. 340 NLC applied only to that subsection, and not to the D provision of sub-s. (2); (iii) whether the Federal Court in *Adorna Properties* had misconstrued the provisions of sub-ss. (2) and (3) of s. 340 NLC; (iv) whether the ruling in *Adorna Properties* was no longer good law and therefore it was wrong of the Court of Appeal below to have followed it; and (v) whether the Court of E Appeal below had misdirected itself in law for being overly concerned with the manner the appellant here had got his name registered onto the title.

Held (allowing the appeal) (unanimous decision)
F Arifin Zakaria CJ (Malaya) (delivering the judgment of the court):

(1) Section 340 NLC introduced into our land law the concept of indefeasibility of title. Indefeasibility can be immediate or deferred. Immediate indefeasibility means that the immediate G registered title or interest of the proprietor or transferee, immediately to the vitiating circumstances, will be conferred statutory protection despite the existence of any vitiating circumstances. In deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a H subsequent transfer. Therefore, the difference between immediate and differed indefeasibility hinges on the effect of registration *vis a vis* the title or interest. (paras 19, 20 & 21)

(2) It is trite law that this court may depart from its earlier I decision if it is found to be wrong, uncertain, unjust, outmoded or obsolete in the modern conditions (*Dalip Bhagwan Singh v. PP*). (para 41)

(3) The question was whether the proviso following sub-s. (3) applied equally to sub-s. 2(b) of s. 340 NLC. A proviso to a subsection would not apply to another subsection. A proviso carves out an exception to the provision immediately preceding the proviso and to no other (See *M/s Gajo Ram v. State of Bihar*; *Ram Narain Sons Ltd v. Ass Commr of Sales – tax*). (para 49)

(4) Subsection (3) of s. 340 NLC merely provided that any title or interest which was defeasible by any of the circumstances specified in sub-s (2) shall continue to be liable to be set aside in the hands of a subsequent holder of such title or interest. That subsection was subject to the following proviso which read "Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser." The proviso was directed towards the provision of sub-s. (3), supported by the use of the words "in this subsection" found therein. The application of the proviso could not be projected into the sphere or ambit of any other provisions of s. 340. (paras 50 & 51)

(5) Although sub-s. (3) of s. 340 NLC made reference to sub-s. (2), sub-s. (3) was restricted to subsequent transfers or interests in the land. It did not apply to an immediate transferee of any title or interest in land. *Adorna Properties* did not fall under the category of subsequent acquirers and therefore could not take advantage of the proviso to sub-s. (3). (para 52)

(6) The Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2), (3) NLC by coming to the erroneous conclusion that the proviso to sub-s. (3) applied equally to sub-s. (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC contrary to the provision of s. 340. (para 53)

(7) In the present case, the charge instruments were indisputably forged instruments. It followed that the two charges were liable to be set aside under s. 340(2)(b) NLC. The third respondent was the immediate holder of those charges. It could not take advantage of the proviso to s. 340(3). The answer, therefore, to the question posed before the court –

A "Whether an acquirer of a registered charge or other interest or title under the National Land Code 1965 by means of a forged instrument acquires an immediate indefeasible interest or title" – was answered in the negative. (paras 55, 56 & 57)

B **(8)** The Court of Appeal in the present case was unnecessarily concerned with the manner the appellant got his name registered on to the title. The appellant's registered proprietorship was not an issue as it was not challenged by any party including the third respondent. The question was C whether the charges registered in favour of the third respondent were defeasible under sub-s. (2)(b) NLC. (para 60)

(9) The fact that the third respondent acquired the interest in good faith for value was not an issue. Once it was satisfied D that the charges arose from void instruments, it automatically followed that they were liable to be set aside at the instance of the registered proprietor, namely, the appellant. (para 61)

Per Zaki Tun Azmi CJ delivering separate concurring judgment:

E

(1) The error committed by the Federal Court in *Adorna Properties* was to read the proviso to sub-s. (3) as being a proviso to sub-s. (2) of s. 340 NLC. That error was very obvious because the proviso expressly referred to "this subsection" F which must, in the context of that subsection, be read as a proviso solely to sub-s. (3). (para 10)

(2) The law should be restated since the error committed by the Federal Court in *Adorna Properties* was so obvious and blatant. It was a well-known fact that some unscrupulous people have G been taking advantage of this error by falsely transferring titles to themselves. With this decision, it was hoped that the Land Authorities would be extra cautious when registering transfers. (para 11)

H *[Order in terms of prayers in amended statement of claim. Costs of appeal and in courts below awarded to appellant.]*

Bahasa Malaysia *Translation Of Headnotes*

I Ini adalah rayuan terhadap keputusan Mahkamah Rayuan yang secara pentingnya memerintahkan: (i) bahawa berdasarkan perkataan s. 340(2) dan (3) Kanun Tanah Negara ('KTN'), serta autoriti *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2

CLJ 133 *('Adorna Properties')*, responden ketiga bank/pemegang gadaian di sini telah mendapat hakmilik yang sah terhadap hartanah perayu, walaupun instrumen gadaiannya didapati telah dipalsukan; dan (ii) bahawa, oleh kerana perayu, walaupun menjadi pemilik berdaftar, sebenarnya tidak pernah memohon tanah tersebut dan tidak tahu bahawa beliau adalah pemilik berdaftarnya sehinggalah responden ketiga mengeluarkan notis tuntutan, maka permohonan relif deklaratori beliau tidak boleh bertahan dan seharusnyalah gagal.

Perayu adalah pemilik berdaftar suatu hartanah di Kuantan, Pahang. Tanpa disedari perayu, responden pertama, bertindak atas satu suratkuasa wakil palsu ('PA'), telah memeterai dua gadaian untuk manfaat bank bagi mendapatkan pinjaman untuk responden kedua. Responden kedua gagal membayar balik pinjaman dan bank dengan itu menuntut dari perayu. Perayu memohon untuk mengisytiharkan gadaian tak sah dan batal atas alasan bahawa PA telah dipalsukan, namun permohonannya ditolak oleh Mahkamah Tinggi atas alasan bahawa perayu "bukan pemilik sebenar tanah" dan bahawa s. 340(3) KTN (dibaca bersama provisonya) telah melindungi responden ketiga. Sepertimana halnya, rayuan perayu ke Mahkamah Rayuan telah ditolak.

Tidak dinafikan bahawa di bawah sub-s. (2) s. 340 NLC, hakmilik atau kepentingan mana-mana pembeli hartanah adalah boleh disangkal antara lain dalam kes-kes yang melibatkan fraud atau salahnyataan atau di mana pendaftaran diperolehi melalui pemalsuan. Sub-seksyen (3) pula memperuntukkan bahawa dalam keadaan-keadaan keboleh-sangkalan seperti yang disenarai di bawah sub-s. (2), hakmilik atau kepentingan sedemikian juga tertakluk kepada penyangkalan terhadap "siapa-siapa yang kepadanya tanah tersebut kemudian dipindahmilik". Sub-s. (3) bagaimanapun mempunyai proviso yang berbunyi "... tiada apapun di dalam seksyen kecil ini akan memberi kesan kepada hakmilik atau kepentingan yang diperolehi oleh seorang pembeli suci hati dengan balasan bernilai ...". Mahkamah Persekutuan dalam *Adorna Properties* secara berkesannya merumuskan bahawa, berdasarkan proviso kepada sub-s. (3) di atas, maka perayu di situ, selaku pembeli *bona fide* dengan balasan bernilai, telah terkeluar dari pemakaian peruntukan substantif sub-s. (3), sekaligus memberikannya hakmilik yang sah terhadap tanah, walaupun instrumen pindahmiliknya telah dipalsukan. Selain itu, adalah menjadi pandangan mahkamah tersebut bahawa proviso kepada

A sub-s. (3) juga terpakai kepada peruntukan sub-s. (2). Dalam rayuan di sini, hujah-hujah nampaknya telah dikemukakan bagi pihak perayu bahawa proviso kepada sub-s. (3) terpakai secara eksklusif kepada keadaan-keadaan yang dikatakan oleh sekysen kecil itu sahaja – dan tidak sebaliknya – dan bahawa Mahkamah B Persekutuan di dalam *Adorna Properties* dengan itu telah tersalah tafsir akan makna dan maksud sub-s. (2) dan (3) serta khilaf dalam membuat perintah sepertimana yang dibuatnya.

Walau apapun, berdasarkan persoalan undang-undang tunggal yang C dikemukakan kepada Mahkamah Persekutuan dalam rayuan semasa, menjadi kewajipan yang arif hakim-hakim untuk memutuskan isu-isu berikut: (i) sama ada konsep ketakboleh-sangkalan seperti yang diutarakan oleh s. 340 KTN merujuk kepada ketakboleh-sangkalan serta merta atau ketakboleh-sangkalan D tertunda; (ii) sama ada proviso sub-s. (3) s. 340 KTN hanya terpakai kepada seksyen kecil tersebut, dan tidak kepada sub-s. (2); (iii) sama ada Mahkamah Persekutuan dalam *Adorna Properties* telah tersalah tafsir peruntukan sub-ss. (2) dan (3) s. 340 KTN; (iv) sama ada undang-undang seperti yang diputuskan oleh *Adorna* E *Properties* sudah lapuk dan kerana itu adalah salah bagi Mahkamah Rayuan untuk mengikutinya; dan (v) sama ada Mahkamah Rayuan di bawah telah tersalah arah akan dirinya di sisi undang-undang kerana memberi perhatian yang berlebihan kepada persoalan bagaimana nama perayu didaftarkan atas dokumen hakmilik.

F **Diputuskan (membenarkan rayuan) (sebulat suara)**
Oleh Arifin Zakaria HB (Malaya) (menyampaikan penghakiman mahkamah):

(1) Seksyen 340 KTN telah memperkenalkan konsep ketakboleh-G sangkalan ke dalam undang-undang tanah kita. Ketakboleh-sangkalan boleh sahaja berbentuk serta merta atau tertunda. Ketakboleh-sangkalan serta merta bermakna bahawa suatu hakmilik berdaftar serta merta atau kepentingan pemilik atau transfree, sebaik berbangkitnya halkeadaan yang menjejaskan, H akan mendapat perlindungan statutori walaupun dengan wujudnya halkeadaan menjejaskan tersebut. Mengenai ketakboleh-sangkalan tertunda, ketakboleh-sangkalan hanya boleh terikat kepada hakmilik atau kepentingan apabila berlaku pindahmilik yang seterusnya. Oleh itu, perbezaan di antara I ketakboleh-sangkalan serta merta dan tertunda adalah bergantung kepada kesan pendaftaran *vis-à-vis* hakmilik atau kepentingan berkenaan.

(2) Adalah menjadi undang-undang mantap bahawa mahkamah ini boleh menyimpang dari keputusan terdahulunya jika ia didapati salah, kabur, tidak adil, atau sudah ketinggalan dan lapuk mengambilkira keadaan dunia moden kini *(Dalip Bhagwan Singh v. PP)*.

(3) Persoalannya adalah sama ada proviso yang menyusuli sub-s. (3) juga terpakai kepada sub-s. 2(b) s. 340 KTN. Suatu proviso kepada suatu seksyen kecil adalah tidak terpakai kepada seksyen kecil yang lain. Suatu proviso menyatakan pengecualian kepada peruntukan yang mendahului sejurus sebelumnya dan tidak kepada yang lain (lihat *M/s Gajo Ram v. State of Bihar*; *Ram Narain Sons Ltd v. Ass Commr of Sales – tax*).

(4) Sub-seksyen (3) s. 340 KTN hanya memperuntukkan bahawa mana-mana hakmilik atau kepentingan yang boleh disangkal oleh mana-mana keadaan yang disenaraikan oleh sub-s. (2) hendaklah terus boleh diketepikan di tangan pemegang hakmilik atau kepentingan yang seterusnya. Seksyen kecil ini adalah tertakluk kepada proviso yang berbunyi "dengan syarat tiada apapun dalam seksyen kecil ini boleh menjejaskan mana-mana hakmilik atau kepentingan yang diperolehi oleh seorang pembeli suci hati dengan balasan bernilai, ataupun oleh mana-mana orang atau badan yang menuntut di bawah atau bagi pihak pembeli sedemikian". Proviso adalah ditujukan kepada peruntukan sub-s. (3), di mana ini disokong oleh perkataan "dalam seksyen kecil ini" yang terdapat di dalamnya. Pemakaian proviso tidak boleh dihalakan kepada rangkuman atau lengkongan lain-lain peruntukan s. 340 KTN.

(5) Walaupun sub-s. (3) s. 340 KTN membuat rujukan kepada sub-s. (2), sub-s. (3) adalah terhad kepada pindahmilik hakmilik atau kepentingan yang menyusul kemudian. Ia tidak terpakai kepada siapa-siapa yang mendapat hakmilik serta merta terhadap mana-mana hakmilik atau kepentingan di dalam tanah. *Adorna Properties* tidak termasuk ke dalam kategori pemeroleh yang menyusul kemudian dan kerana itu tidak boleh mengambil manfaat terhadap proviso kepada sub-s. (3).

(6) Mahkamah Persekutuan dalam *Adorna Properties* telah tersalah tafsir s. 340(1), (2), (3) KTN dengan mencapai konklusi yang salah bahawa proviso kepada sub-s. (3) terpakai sama kepada sub-s. (2). Dengan berbuat demikian, Mahkamah Persekutuan

telah memberi pengiktirafan kepada konsep ketakbolehsangkalan serta merta di bawah KTN yang bersalahan dengan peruntukan s. 340 KTN.

(7) Dalam kes semasa, tidak dinafikan bahawa instrumen gadaian adalah instrumen palsu. Ianya mengikut bahawa kedua-dua gadaian adalah boleh diketepikan di bawah s. 340(2)(b) KTN. Responden ketiga adalah pemegang serta merta gadaian-gadaian tersebut. Maka ia tidak boleh mengambil manfaat akan proviso s. 340(3). Oleh itu, jawapan kepada soalan yang dikemukakan kepada mahkamah – "sama ada seseorang yang memperolehi satu gadaian berdaftar atau lain-lain kepentingan atau hakmilik di bawah Kanun Tanah Negara melalui instrumen palsu memperolehi suatu hakmilik atau kepentingan serta merta yang tak boleh disangkal" – adalah berbentuk negatif.

(8) Mahkamah Rayuan dalam kes semasa menunjukkan keperihatinan tidak perlu yang keterlaluan terhadap bagaimana nama perayu tercatat sebagai pemilik berdaftar di atas geran hakmilik. Kepemilikan berdaftar perayu bukanlah suatu isu kerana itu tidak dicabar oleh mana-mana pihak termasuk responden ketiga. Persoalannya adalah sama ada gadaian-gadaian yang didaftar untuk manfaat responden ketiga adalah boleh disangkal di bawah sub-s. (2)(b) KTN.

(9) Fakta bahawa responden ketiga memperoleh suatu kepentingan secara suci hati dan untuk nilai bukan merupakan suatu isu. Sebaik sahaja mahkamah berpuas hati bahawa gadaian-gadaian dimeterai melalui instrumen yang batal, maka ia secara automatik boleh diketepikan oleh pemilik berdaftar, iaitu perayu.

Oleh Zaki Tun Azmi KHN menyampaikan penghakiman menyetujui berasingan:

(1) Kesilapan yang dilakukan oleh Mahkamah Persekutuan dalam *Adorna Properties* adalah kerana membaca proviso kepada sub-s. (3) sebagai satu proviso kepada sub-s. (2) s. 340 KTN. Kesilapan tersebut adalah ketara kerana proviso tersebut secara ekspres merujuk kepada "seksyen kecil ini" yang, dalam konteks seksyen kecil tersebut, harus dibaca sebagai proviso kepada sub-s. (3) sahaja.

(2) Undang-undang harus dipernyatakan semula kerana kesilapan yang dilakukan oleh Mahkamah Persekutuan dalam *Adorna Properties* adalah ketara dan blatant. Adalah fakta yang

diketahui ramai bahawa terdapat orang-orang yang tidak berhati perut di luar sana yang telah mengambil kesempatan atas kesilapan ini dengan melakukan pemalsuan dan seterusnya memindahmilik tanah kepada diri mereka. Dengan keputusan ini, adalah diharapkan Pihakberkuasa Tanah akan lebih berhati-hati bila memindahmilik tanah-tanah.

[Perintah menurut terma permohonan seperti dalam penyata tuntutan terpinda. Kos rayuan dan di mahkamah di bawah diaward kepada perayu.]

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(ovrd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

*Ismail Mohamad & Anor v. Ismail Husin & Ors [2005] 4 CLJ 328 HC****(refd)***

OCBC Bank (Malaysia) Berhad v. Pendaftar Hak Milik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA ***(refd)***

Frazer v. Walker [1967] AC 569 ***(refd)***

Liew Yok Yin v. AGS Harta Sdn Bhd [2006] 3 CLJ 787 HC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14; [1994] 2 BLJ 156 SC ***(refd)***

M/s Gajo Ram v. State of Bihar AIR [1956] Pat 113 ***(refd)***

Mok Yong Chuan v. Mok Yong Kong & Anor [2005] 1 LNS 319 ***(refd)***

Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1981] 1 LNS 114 HC ***(refd)***

PTJV Denson (M) Sdn Bhd v. Roxy (M) Sdn Bhd [1980] 1 LNS 55 ***(refd)***

Ram Narain Sons Ltd v. Ass Commr of Sales – tax AIR [1955] SC 765 ***(refd)***

Legislation referred to:

National Land Code, ss. 5, 258(a), (b), 261(1)(c), 340(1), (2)(a), (b), (c), (3)

Other source(s) referred to:

NS Bindra, *Interpretation of Statutes,* 9th edn, p 110

Judith Sihombing, *The National Land Code, A Commentary,* vol 2, para 404

PK Nathan, *Nightmare For Registered Owners of Landed Property,* [2002] CLJ xxiii

Prof Teo Keang Sood, *Demise of Deferred Indefeasibility Under the Malaysia Torrens System?* Singapore Journal of Legal Studies, 2002, pp 403-408

For the appellant - T Mura Raju (Bob S Arumugam; M/s Siva, Ram & Kong
For the third respondent - Dato' Bastian Vendargon (Ong Siew Wan with him); M/s Andrew David Wong & Ong
Amicus Curae - See Mee Chun SFC (Azizah Hj Nawawi SFC with her)
Watching brief - Roger Tan (Tony Woon with him)

Reported by Usha Thiagarajah & Wan Sharif Wan Ahmad

JUDGMENT

Zaki Tun Azmi CJ:

[1] I had the privilege of reading the draft of my learned Chief Judge of Malaya Arifin Zakaria's grounds of judgment. I must give him credit for having traced the history of decisions made on the interpretation of s. 340[1] of the National Land Code 1965 (NLC). I agree with his conclusions.

[2] I wish to, however, express my own views in support of that judgment.

[3] The facts of this case, which are not disputed, have been well narrated in his judgment and I do not wish to repeat them here.

[4] I would like to look at s. 340 of the NLC in a more simplified manner.

[5] Let us refer to the first owner of a piece of land as "A" who then transfers the same piece of land to "B" and which subsequently is transferred to "C".

[6] As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.

[7] Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s. 340(2)(a) of the NLC). Otherwise B stands in the same position as A.

[8] The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (See s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

[9] The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-section (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration. Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

[10] As far as I am concerned, that is the simplest way of looking at s. 340 of the NLC. I totally agree with the learned Chief Judge of Malaya's view that the error committed by the Federal Court in *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit*[2] was to read the proviso to sub-section (3) as being a proviso to sub-section (2) as well. The error is very obvious because the proviso expressly refers to "this sub-section" which must in the context of that sub-section be read as proviso to sub-section (3) only.

[11] I am legally obligated to restate the law since the error committed in *Adorna Properties* is so obvious and blatant. It is quite a well known fact that some unscrupulous people have been taking advantage of this error by falsely transferring titles to themselves. I hope that with this decision, the Land Authorities will be extra cautious when registering transfers.

[12] In the circumstances and for the reason mentioned above, I would concur with the Chief Judge of Malaya Arifin Zakaria, allow this appeal and make the same orders made by him. I also agree that the costs of this appeal and the courts below be awarded to the appellant.

Arifin Zakaria CJ (Malaya):

Introduction

[13] This is an appeal against the decision of the Court of Appeal dated 27 August 2008 dismissing the appellant's appeal. Leave to appeal was granted on a single question which reads:

> Whether an acquirer of a registered charge or other interest or title under the National Land Code 1965 by means of a forged instrument acquires an immediate indefeasible interest or title.

Facts

[14] The facts relevant to this appeal may briefly be stated as follows:

The appellant/plaintiff is the registered owner of a piece of land held under H.S. (M) No: 6033 PT No. 6371 Mk. Kuala Kuantan, Kuantan, Pahang ('the land'). The 1st respondent/defendant purporting to act under a power of attorney No. 80/97 (PA) executed two charges in favour of United Malayan Banking Corporation, the 3rd respondent/defendant herein, to secure the loans of RM200,000 and RM100,000 respectively. The loans were made in favour of Cini Timber Industries Sdn Bhd, the 2nd respondent/defendant.

[15] The appellant claimed that he did not sign the PA. He claimed it was forged. He only became aware of the forgery when he received a notice of demand from the 3rd respondent dated 9 March 1985.

He then filed a claim in the High Court seeking the following reliefs:

(a) a declaration that the said charges are void *ab initio*;

(b) an order expunging from the register and the issue document of title the memorial of charges against the land;

(c) an order directing the 3rd respondent to deliver up to him the issue document of title to the land; and

(d) a declaration that the PA purportedly executed by him in favour of the 1st respondent is void *ab initio* and an order cancelling or revoking the same.

[16] It is pertinent to note that the learned High Court Judge made the following findings, which were not disputed by the parties, namely:

(a) the registration of the appellant in the issue document of title was obtained by fraud or forgery;

(b) the appellant had never charged the land to the 3rd respondent;

(c) the appellant had never granted the PA to the 1st respondent; and

(d) the appellant had never given authority to the 1st respondent to charge the land to the 3rd respondent.

[17] It is common ground that the 3rd respondent, in whose favour the charges were registered, is an immediate holder of the interest on the land.

The Issues

[18] The principal issue in this case is whether s. 340 of the National Land Code ('NLC') confers upon the registered proprietor or any person having registered interest in the land an immediate or deferred indefeasibility. This was once thought to be a settled question of law until the decision of this court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 *(Adorna Properties)*. In that case it was held, *inter alia*, that by virtue of the proviso to sub-s. (3) of s. 340 of the NLC, any purchaser in good faith for valuable consideration is excluded from the application of the said provision. It follows, therefore, that this category of proprietors enjoy immediate indefeasible title to the lands. Therefore, despite the court's finding that the instrument of transfer was forged the appellant nevertheless obtained an indefeasible title to the land. The decision of this court in that case had a far reaching effect on the land law and land administration in this country. For ease of reference we set out below s. 340(1), (2) and (3). It reads:

340. Registration to confer indefeasible title or interest, except in certain circumstances.

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s. (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[19] Section 340 of the NLC introduced into our land law the concept of indefeasibility of title. This is central to the system of registration of title under the Torrens system. Raja Azlan Shah (as His Royal Highness then was) in *PTJV Denson (M) Sdn Bhd v. Roxy (M) Sdn Bhd* [1980] 1 LNS 55 observed that 'the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it.' Indefeasibility is defined by the Privy Council in *Frazer v. Walker* [1967] AC 569 at p 580 to mean:

> The expression not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he

> relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

[20] Indefeasibility can be immediate or deferred. The distinction between the two is well explained in para 404 of *The National Land Code, A Commentary (Vol 2)* by Judith Sihombing which reads:

> There are two types of indefeasibility; immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility.

[21] In short, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection despite the existence of any vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer. Thus, the difference between immediate and deferred indefeasibility hinges on the effect of registration *vis a vis* the title or interest.

[22] Before the decision of *Adorna Properties* the prevailing view was that s. 340 of the NLC confers deferred indefeasibility as opposed to immediate indefeasibility. This was confirmed by the Federal Court in *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Others* [1981] 1 LNS 114. This is further reinforced by the Supreme Court's decision in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14. There the Supreme Court, comprising of Abdul Hamid Omar LP, Edgar Joseph Jr and Wan Yahya SCJJ held that indefeasibility can be rebutted not only by fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.

[23] In that case, it was held that failure to comply with the statutory requirements of para (a) and (b) of s. 258 and para (c) of s. 261(1) of the NLC was not just a mere irregularity, but was an illegality which struck at the root of the first respondent's right to be heard. Therefore, the certificate issued by the Senior Assistant Registrar was *ultra vires* the statutory provisions of the NLC and the title was unlawfully acquired by the first appellant. The title of the first appellant was defeasible under s. 340(2)(c) of the NLC and the learned judge had arrived at a correct decision when he made the order for the cancellation of the registration of the transfer.

[24] The above position is reflected in the judgment of the Court of Appeal in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17. This was followed by another panel of Court of Appeal in *OCBC Bank (Malaysia) Berhad v Pendaftar Hak Milik Negeri Johor Darul Takzim* [1999] 2 CLJ 949. In the latter case the appellant bank granted an overdraft facility to one Ng See Chow ('the borrower') which was secured by a charge registered in favour of the appellant over some lands in Johore. The borrower defaulted in the overdraft facility and the appellant commenced foreclosure proceedings and obtained an order for sale on 12 May 1992. On 15 September 1992, at the request of the police, the respondent entered a Registrar's Caveat on the land on the basis of police investigations into the report of one Ng Kim Hwa who claimed that the land belonged to him and that he had never executed any transfer in favour of the borrower. Nevertheless, this first caveat was removed on 3 February 1993 with the consent of the respondent. Ng Kim Hwa thereafter brought an action against the borrower to recover the land and intervened in the appellant's foreclosure proceedings to set aside the order for sale or to stay the execution of the same pending the outcome of his civil suit against the borrower. The appellant contended that the charge on the land was indefeasible pursuant to s. 340 of the NLC as the appellant had obtained the same in good faith for valuable consideration.

[25] The High Court dismissed Ng Kim Hwa's application and based on this decision the appellant took steps to proceed with the auction. Two days prior to the date of the auction, a second caveat was entered by the respondent based on similar grounds as in the first caveat as well as letters from the Central Registry of Criminals Malaysia. The appellant applied to remove the second

caveat but the application was dismissed by the High Court. The Court of Appeal having heard the submissions of the parties, dismissed the appeal.

[26] NH Chan, JCA in delivering the judgment of the Court of Appeal was of the opinion that the proviso to s. 340(3) of the NLC applies exclusively to those situations which are covered by sub-s. (3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the true owner since the title was obtained by forgery. On the facts of that case we agree that the title of Ng See Chow is defeasible under s. 340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant bank, being the holder of subsequent interest in the land is protected by the proviso to s. 340(3) of the NLC. For that reason we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.

[27] That was the position prior to the decision of this court in *Adorna Properties*. In *Adorna Properties* the respondent was the registered proprietor of a piece of land which had been sold and transferred to the appellant. The respondent claimed that the vendor had forged her signature, sold and transferred the land to the appellant. The High Court dismissed the respondent's claim. The decision of the High Court was reversed by the Court of Appeal. The appellant appealed. The questions of law posed for decision of this court were:

1. whether the standard of proof to prove forgery is on balance of probabilities or beyond reasonable doubt; and

2. whether the appellant, a *bona fide* purchaser for valuable consideration without notice, acquired an indefeasible title to the land by virtue of s. 340(3) of the NLC.

[28] This court in a panel comprising of Eusoff Chin CJ, Wan Adnan CJ (Malaya) and Abu Mansor FCJ held that by virtue of the proviso to s. 340(3) of the NLC, a purchaser in good faith and for valuable consideration is excluded from the application of the substantive provision of s.340(3). This category of registered proprietors obtains immediate indefeasible title to the land. Thus, on the facts of that case, even if the instrument of transfer was forged, the appellant nevertheless obtained an indefeasible title to the land.

[29] The effect of *Adorna Properties* is to confer immediate indefeasibility to the registered proprietor. That decision was followed, *albeit* reluctantly, in a number of subsequent cases. In *Ismail Mohamad & Anor v. Ismail Husin & Ors* [2005] 4 CLJ 328, where I set as a High Court Judge, I held that I was bound by *Adorna Properties* and on that premise, I ruled in favour of the 4th defendant.

[30] In that case, the plaintiffs, the registered proprietors of three pieces of land (the said lands), entered into a sale and purchase agreement ('the agreement') with the 1st defendant whereby the 1st defendant agreed to purchase the said lands for a total consideration of RM7.5 million. The agreement was prepared by the 2nd defendant, an advocate and solicitor, practising under the name of Sajali & Aziz, the 3rd defendant in the suit. Under the agreement, a sum of RM150,000 was to be paid on the date of the execution of the agreement and a further sum of RM50,000 was to be paid within a period of one month from the date of the agreement. The balance sum of RM7,300,000 was to be paid to the 3rd defendant as the stakeholder within three months from the date of the agreement. The 1st defendant paid the two sums of RM150,000 and RM50,000 as agreed; the balance sum of RM7,300,000 remained unpaid. Upon enquiry, the plaintiffs discovered that the said lands had been charged to the 4th defendant as security for a term loan of RM16 million to the 5th defendant, out of which RM10 million had already been disbursed to the 5th defendant. The plaintiffs claimed that they had no knowledge of the charge and that they had not signed the charge document nor the charge annexure. They further claimed that what purported to be their signatures on the charge document and the charge annexure were forgeries. The plaintiffs brought a suit, their case being that the defendants' intention to defraud the plaintiffs had been conceived even before the agreement was entered into. The plaintiffs submitted that in the circumstances, the interest registered by way of a charge in favour of the 4th defendant was defeasible under one or more of the grounds set out in s. 340(2) of the NLC.

[31] In that case even though I found that the signatures of the plaintiffs both on the charge and the annexure to the charge were forged, I held that the charge was valid as I was bound by the decision of the Federal Court in *Adorna Properties*. Therefore, the chargee bank's interest in the said land is indefeasible. I said at p. 343:

> ... on that premise I would dismiss the first ground relied upon by the learned counsel for the plaintiffs. Similarly I find no merit in the second and third grounds advanced herein. I am of the view that the decision of the Federal Court is binding on this court despite whatever criticism that may be levelled against it. To hold otherwise would be to go against the principle of *stare decisis*.

My decision in that case was reversed by the Court of Appeal, in a majority decision, on another ground which is not relevant to the present case.

[32] In *Mok Yong Chuan v. Mok Yong Kong & Anor* [2005] 1 LNS 319 the plaintiff and the first defendant were brothers and the subject of the dispute concerned the 2/3 share in the property ('the property') which was at one time registered under the name of 'Boh Yong Kwang' which the 1st defendant maintained was a variant spelling of his name. The 1st defendant had caused a rectification of the spelling of the name 'Boh Yong Kwang' on the documents of title to the property to his name 'Mok Yong Kong' and thereafter transferred the property to the 2nd defendant. The plaintiff claimed for declaratory reliefs that the rectification of the name 'Boh Yong Kwang' to 'Mok Yong Kong' on the title of the property by the 1st defendant and the subsequent transfer of the property to the 2nd defendant be declared unlawful and void. The plaintiff predicated his claim on fraud by the 1st defendant and conspiracy by the 2nd defendant. He alleged that the 1st defendant had committed fraud in holding himself out as 'Boh Yong Kwang' and in rectifying the spelling of 'Boh Yong Kwang' to 'Mok Yong Kong' on the documents of title to the property as Boh Yong Kwang was their late father and not the 1st defendant. The 2nd defendant denied any conspiracy with the 1st defendant to defraud the plaintiff and averred that as a *bona fide* purchaser for value and upon registration he had acquired an indefeasible title under s. 340 of the NLC.

[33] The learned judge found that the plaintiff failed to prove fraud being committed by the first defendant. By way of *obiter* he observed that based on *Adorna Properties* currently the law in Malaysia adopts the doctrine of immediate indefeasibility, and that put the 2nd defendant's position in that case beyond doubt.

[34] In *Liew Yok Yin v. AGS Harta Sdn Bhd* [2006] 3 CLJ 787 the plaintiff was the original registered owner of a piece of land. Subsequently the land was registered in the name of the defendant. The plaintiff claimed for a declaration that the plaintiff

was still the owner of the land and that the defendant's registration was void on the ground that the registration of title in the defendant's name was obtained by forgery and/or by means of an insufficient and/or void instrument as the plaintiff had never at any time executed any instrument of transfer in the defendant's favour, that the original issue document of title had all along been in her possession and that she never parted with it. The defendant in their defence denied this and pleaded even if forgery existed they were bona fide purchaser for value having paid the full purchase price of RM500,000 and the relevant stamp duties and registration fees and by reason thereof had acquired indefeasible title under s. 340 of the NLC.

[35] The learned judge found that the sale documentation was a forgery as it does not bear the signature of the plaintiff and hence the defeasibility provision of s. 340(2)(b) of the NLC applies. He said that even applying *Adorna Properties* to defeat the applicability of s. 340(2)(b) the defendant has to prove that he is a *bona fide* purchaser for value under the proviso to s. 340(3) of the NLC, a burden which the defendant failed to discharge.

[36] Raus Sharif JCA (as he then was) in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 in discussing on the proviso of s. 340(3) NLC said:

> To me, by virtue of s. 340(2)(b) of the Code, the title of Adorna Properties was not indefeasible as the registration was obtained by forgery. Section 340(3) does not apply to s. 340(2). The proviso states "Provided that in this sub-section" and this sub-section refers to s. 340(3) and not s. 340(2). Section 340(3)(a) refers to "to whom it may subsequently be transferred" which means that the intended purchaser is the subsequent purchaser and not the immediate purchaser.

[37] Gopal Sri Ram JCA (as he then was) in the same case opined that the Federal Court's decision in *Adorna Properties* was decided *per incuriam* and should not be treated as binding for the reasons that:

1. Section 340(3) applies to subsequent acquirers of land, taking from a registered proprietor whose title is defeasible as stipulated in s. 340(2), a class which *Adorna Properties* does not belong to since it took its title from a forger.

2. Federal Court in *Adorna Properties* when arriving at its decision overlooked at least two authorities which hold that the Code provides for deferred indefeasibility. In *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 LNS 114 and *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 2 BLJ 156 which propagate the doctrine of deferred indefeasibility in the NLC.

3. The learned CJ in *Adorna Properties*, equated purchasers and registered proprietors overlooking the provisions of s. 5 of the code which defines them separately and differently.

[38] Apart from above, much criticism have been levelled against the judgment of the Federal Court in *Adorna Properties* by academic writers. PK Nathan in his article *"Nightmare For Registered Owners of Landed Property"* published in [2002] CLJ xxiii said:

> The decision of the Federal Court in the case of *Adorna Properties Sdn Bhd v. Boonsoom Boonyanit* [2001] 2 CLJ 133 has placed registered owners of landed properties on thin ice and in jeopardy. As a result of the decision, land owners may, one morning, find themselves no longer owning their landed properties without any fault, doing or knowledge in their part.

[39] Associate Professor Teo Keang Sood of the Faculty of Law, National University of Singapore in an article *"Demise of Deferred Indefeasibility Under the Malaysia Torrens System?"* (Singapore Journal of Legal Studies, 2002, pp 403-408) stated:

> Having misconstrued the legislative intent as embodied in s. 340, the case of *Adorna Properties Sdn Bhd i*s clearly wrongly decided on the issue of indefeasibility involving forgery and should not be followed. Whatever may be the advantages of immediate indefeasibility, it is for Parliament, to change the law, and until that is done, it is for the Courts to interpret the law as it stands.

[40] The learned writer again in a paper presented at the Malaysian Law Conference on 29 October 2007 entitled *"Basics of Indefeasibility under the National Land Code"* said:

> With its decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit*, the Malaysian Federal Court has not only spawned academic articles on the subject of indefeasibility of title and interests under the National Land Code 1965 (hereinafter referred to as 'the NLC') but has, unfortunately, also left an unwanted

trail of uncertainty and insecurity of title for landowners which the Torrens system of land registration embodied in the NLC seeks to avoid, not to mention the slew of conflicting decisions pronounced in its aftermath.

Was *Adorna Properties* Correctly Decided?

[41] It is trite law that this court may depart from its earlier decision if the former decision sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions. (see *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645)

[42] At this juncture it may be appropriate for us to consider what was in fact the decision in *Adorna Properties* and the underlying reasons for the decision. In that case two questions were posed to the Federal Court arising from the decision of the Court of Appeal in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17. What concern us is the second question which reads: "Whether the appellant, a *bona fide* purchaser for valuable consideration without notice, acquired an indefeasible title to the land by virtue of s. 340(3) of the NLC." The court answered the question in the positive.

[43] The reasons underlying this decision appeared in the judgment of the court rendered by the Eusoff Chin CJ. He said that the court is not to look at what is the Torrens system as practised in other jurisdictions but to interpret s. 340 as it stands, "... and to find the real intention of Parliament when enacting it ... and the intention of Parliament must be deduced from the language used."

[44] We agree with the court that the issue before the court, and likewise before us, is one of proper interpretation to be accorded to s. 340(1), (2) and (3) of NLC. The court then went on to say that s. 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s. 340(2) and (3). Thus far, we think the court was right. The difficulties arose in the interpretation of sub-s.(2) and sub-s. (3). This is what it said at p. 342:

> Subsection (2) states that the title of any such person, ie any registered proprietor or co-proprietor for the time being is defeasible if one of the three circumstances in sub-s. (2)(a), (b) or (c) occurs. We are concerned here with sub-s. (2)(b) where the registration had been obtained by forgery.

> Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s. (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s. (3)(b) says, any interest under any lease, charge or easement subsequently "granted thereout", ie, out of the forged document may be set aside.

At p 343 it said:

> The proviso to sub-s. (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s. (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are those proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s.(3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

[45] In that case, it was stated that the court was concerned with sub-s. (2)(b) where the registration had been obtained by forgery. This is correct because the appellant obtained its title through or under a forged instrument of transfer. That was the finding of the Court of Appeal and affirmed by the Federal Court.

[46] The Court of Appeal took the view that "s. 340 of the code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a *bona fide* purchaser who takes his title from such a registered proprietor." By this bifurcation, the Court of Appeal concluded that Parliament had intended to confer deferred and not immediate indefeasibility. The Court of Appeal stated with approval the view of Dr. Visu Sinnadurai in his book entitled *"Sale and Purchase of Real Property in Malaysia"* which reads:

> In Malaysia, it is submitted that under s. 340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s. 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the

A vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser.

[47] What the Federal Court differed from the Court of Appeal was on the effect to be given to sub-s.(3).

B

[48] Having said that the appellant in *Adorna Properties* had acquired its title to the land through or under a forged instrument and it therefore came under the category of title in sub-s. (2)(b), the court then went on to hold that such a title is insulated from C impeachment by the proviso to sub-s. (3).

[49] The question is, does the proviso following immediately after sub-s. (3), apply to the other provisions of s. 340, in particular to sub-s. 2(b). This can only be deduced from the proviso itself. D *NS Bindra's, Interpretation of Statutes,* 9th edn, at p. 110 states that: "A proviso is something engrafted on a preceding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit E of the main provision." A proviso to a subsection would not apply to another subsection (*M/s Gajo Ram v. State of Bihar* AIR [1956] Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v. Ass Commr of Sales* – tax AIR [1955] SC 765).

F

[50] As we see it, sub-s. (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s.(2) shall continue to be liable to be set aside in the hands of subsequent holder of such G title or interest. This subsection, however, is subject to the proviso which reads:

> Provided that nothing **in this subsection** shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or H under such a purchaser. (emphasis added)

[51] We are of the view that the proviso is directed towards the provision of sub-s.(3) alone and not to the earlier subsection. This in our view is supported by the use of the words "in this I subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s. 340.

[52] Furthermore, eventhough sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s.(3) ought not to be extended as was done by the Court in *Adorna Properties*, to apply to sub-s. (2)(b). By so doing the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

[53] For the above reasons, with respect, we hold that the Federal Court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s. (3) equally applies to sub-s. (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC.

[54] It is interesting to note that learned counsel for the 3rd respondent and the representatives of the Attorney General agreed that *Adorna Properties* was wrongly decided. But notwithstanding that concession, learned counsel for the 3rd respondent maintained that the application by the appellant could not be sustained on other grounds. We will consider his contentions in the subsequent part of this judgment.

[55] Reverting to the facts of this case, it is not in dispute that the two charges registered in favour of the 3rd respondent were based on void instruments as the relevant Forms 16A were not executed by the appellant. They were executed by the 1st respondent pursuant to a forged PA. Thus, the charge instruments (Form 16A) used in the present case were indisputably void instruments. It follows, therefore, that the two charges in this case are liable to be set aside under s. 340(2)(b) since they are based on void instruments.

[56] The 3rd respondent is an immediate holder of these charges. That being the position, the 3rd respondent could not take advantage of the proviso to sub-s. (3) of s. 340.

[57] For the reasons given above, we would therefore answer the question posed to us in the negative. However, learned counsel for the 3rd respondent contended that even if the answer to the question is in the negative, the appeal would still fail for the reason that, the appellant on his own admission said that he had not applied for the land and that he was not aware that the land was registered in his name until the 3rd respondent issued a notice of demand on him.

[58] Learned counsel argued that the appellant in the circumstances of this case is not entitled to and ought not to be granted the declaratory reliefs sought for. A declaratory relief, he contended, is a matter of discretion and in the circumstances of this case, the High Court had correctly exercised the said discretion and this was confirmed by the Court of Appeal.

[59] The Court of Appeal while agreeing that the issue of ownership of the land is a contentious issue, in view of *Adorna Properties*, said that regard must be had to the evidence before the High Court. The Court of Appeal at p. 32 of the appeal record concluded in the following words:

> The position seems to be this, that the appellant though registered as land owner did not actually own the land. On the facts, this position can be distinguished from those in *Adorna Properties*. However the interest of the said land was subsequently granted to the 3rd respondent as chargee who is *bona fide* and who acquired the interest in good faith with consideration.

[60] With the utmost respect to the Court of Appeal, we are of the view that the Court of Appeal was unnecessarily concerned with the manner the appellant got his name registered on to the title. That in our view is not the issue which should concern the court because it was never challenged by any party including the 3rd respondent that the appellant was the registered proprietor of the land. The question before the court was whether the charges registered in favour of the 3rd respondent are defeasible under s. 340(2)(b). At one instance, the Court of Appeal answered the question in the positive having regard to *Adorna Properties*, but in the penultimate paragraph, it stated that the interest of the 3rd

respondent in the land was an interest subsequently granted by the appellant. With respect, we think the Court of Appeal had misdirected itself on the issue before the court.

[61] We must stress that, the fact that the 3rd respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside at the instance of the registered proprietor namely, the appellant.

Conclusion

[62] For the above reasons, we allow this appeal and make an order in terms of prayers (a), (b), (c) and (d) of the amended statement of claim. Costs of this appeal and in the courts below be awarded to the appellant.

[63] Finally we wish to thank learned counsel for the appellant and the 3rd respondent and the representatives of the Attorney General and the Bar Council for their candid arguments which certainly had assisted us in the consideration of the issues before us and in arriving at our decision.

Endnote:

1. Section 340 Registration to confer indefeasible title or interest, except in certain circumstances.

   (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

   (2) The title or interest of any such person or body shall not be indefeasible:

   (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

   (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

   (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent-

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

2. [2001] 2 CLJ 133.